Palm Breeze Sdn Bhd v Ho Hup Construction Co Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-15 OF 1998
SURIYADI J
1 OCTOBER 1998

Civil Procedure *— Striking out — Refiling of action — First action struck out for want of prosecution and delay in prosecuting claim — Whether second similar action filed ought to be struck out for contumelious conduct and breach of 'unless' order — Whether there was abuse of process*

On 7 January 1998, the defendant successfully applied to strike out the plaintiff's claim in Civil Suit No 22-32-1995 on the grounds that the plaintiff failed to take out a summons for directions in accordance with the Rules of the High Court 1980 ('the RHC') or alternatively, that the plaintiff's delay in prosecuting the action was intentional, contumelious/contemptuous, inordinate and unforgivable and had prejudiced the defendant ('the striking out order'). The plaintiff did not appeal against the striking out order but instead filed this present action on 24 February 1998. It was agreed by both parties that the present action was similar in content to the previous action which was struck out and that the relevant limitation period had yet to expire. On 3 April 1998, the defendant unsuccessfully applied to the senior assistant registrar to strike out the present action. The defendant proceeded to appeal to the judge in chambers. The main thrust of the defendant's submissions was that the striking out order was made pursuant to a peremptory order, and its non-compliance was to be construed as disobedience and insubordination. The defendant further argued that the alternative part of the striking out order was wide enough to cover situations whereby the plaintiff's conduct could be construed as contumelious and as such, the filing of the present action, whilst admittedly within the limitation period, was an abuse of the process of court.

Held, dismissing the appeal:

In so far as the first part of the striking out order was concerned, clearly the plaintiff was entitled to refile, if still within time, as the conduct of non-compliance with O 25 r 1(4) of the RHC could not be described as contumelious. As for the second part of the striking out order, there was nothing to indicate that the disobedience of a peremptory or an 'unless' order was the basis of the striking out but rather that inordinate and inexcusable delay was the real pretext. Being in the alternative, there was no certainty that the case was struck out for contumelious behaviour and the plaintiff must be given the benefit of the doubt. As disobedience towards either part of the striking out order had not been established, the defendant had failed to prove the existence of countumelious conduct and abuse of the process of court (see p 679E-I); *Bailey v Bailey & Anor* [1983]

A 3 All ER 495 followed; *Janov v Morris* [1981] 3 All ER 780 distinguished.

[Bahasa Malaysia summary

B Pada 7 Januari 1998, defendan telah berjaya memohon untuk membatalkan tuntutan plaintif dalam Guaman Sivil No 22–32–1995 atas alasan bahawa plaintif telah gagal untuk mengeluarkan satu saman untuk arahan menurut Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atau secara alternatif, bahawa kelewatan plaintif dalam mendakwa tindakan tersebut adalah bersifat teguran/disengajakan, C tidak diendahkan, keterlaluan dan tidak boleh dimaafkan dan telah memudaratkan defendan ('perintah pembatalan tersebut'). Plaintif telah tidak merayu terhadap perintah pembatalan tersebut tetapi sebaliknya telah memfailkan tindakan ini pada 24 Februari 1998. Adalah dipersetujui oleh kedua-dua pihak bahawa tindakan ini adalah sama dalam bentuk kandungan dengan tindakan lalu yang telah D dibatalkan dan bahawa tempoh had masa yang relevan masih belum luput. Pada 3 April 1998, defendan telah gagal dalam permohonan kepada penolong kanan pendaftar untuk membatalkan tindakan ini. Defendan telah membuat rayuan kepada hakim dalam kamar. Penekanan utama penghujahan defendan adalah bahawa perintah E pembatalan tersebut telah dibuat menurut satu perintah muktamad, dan ketidakpatuhannya hendaklah ditafsirkan sebagai keingkaran. Defendan selanjutnya berhujah bahawa bahagian alternatif perintah pembatalan tersebut adalah cukup luas untuk meliputi keadaan-keadaan di mana perlakuan plaintif boleh ditafsirkan sebagai disengajakan dan oleh yang demikian, pemfailan tindakan ini, F sementara diakui dilakukan dalam tempoh had masa, adalah merupakan satu penyalahgunaan proses mahkamah.

Diputuskan, menolak rayuan:

G Sejauh mana bahagian pertama perintah pembatalan tersebut berkaitan, adalah jelas plaintif berhak untuk memfailkan semula, jika ia masih dalam tempoh, kerana perlakuan ketidakpatuhan A 25 k 1(4) KMT tidak boleh diperjelaskan sebagai teguran. Berhubung dengan bahagian kedua perintah pembatalan tersebut, tidak terdapat apa-apa untuk menunjukkan bahawa keingkaran perintah muktamad atau perintah 'kecuali' adalah merupakan dasar pembatalan tersebut H tetapi sebaliknya kelewatan yang keterlaluan dan yang tidak boleh dimaafkan adalah dalih yang sebenarnya. Sebagai berada dalam keadaan alternatif, tidak terdapat sebarang kepastian bahawa kes tersebut telah dibatalkan kerana kelakuan yang memalukan dan plaintif semestinya diberikan kemanfaatan keraguan. Oleh kerana keingkaran I terhadap mana-mana satu bahagian dari perintah pembatalan tersebut masih belum terbukti, defendan telah gagal untuk membuktikan perlakuan yang memalukan dan penyalahgunaan proses mahkamah (lihat ms 679E–I); *Bailey v Bailey & Anor* [1983] 3 All ER 495 diikut; *Janov v Morris* [1981] 3 All ER 780 dibeza.]

Notes

For cases on striking out, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4335–4334.

Cases referred to

Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd & Ors [1980] 2 All ER 655 (refd)
Bailey v Bailey & Anor [1983] 3 All ER 495 (folld)
Janov v Morris [1981] 3 All ER 780 (distd)
King v Davenport (1879) 4 QBD 402 (refd)
Samuels v Linzi Dresses Ltd [1980] 1 All ER 803 (refd)
Whistler v Hancock (1878) 3 QBD 83 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 25 r 1(4)

Liza Chan Sow Keng (*Liza Chan & Co*) for the appellant.
Yau Jiok Hua (*Yau Jiok Hua & Co*) for the respondent.

Suriyadi J: A writ of summons and statement of claim were filed as GS 22–32–1995 sometime on 19 June 1995 by the plaintiff. As the defendant first time around pursuant to an application on 29 April 1997 failed to have that civil suit struck out, a second application ensued in its wake. On 7 January 1998, it met with success. The plaintiff did not appeal and the matter ended there. That relevant order is marked as MNM-2a found in encl 6, and in brief reads:

> (1) Bahawa tuntutan plaintif di dalam writ saman dan pernyataan tuntutan bertarikh 19 Jun 1995 dibuangkan:
>
> (a) mengikut A 25 k 1(4) Kaedah-Kaedah Mahkamah Tinggi 1980;
>
> (b) alternatifnya, di bawah bidang kuasa sedia ada mahkamah yang mulia ini atas alasan bahawa pendakwaan tindakan plaintif telah dilengahkan dengan secara sengaja dan menghina atas kelengahan tersebut adalah berlebihan dan tidak dapat dimaafkan sehingga ia memprejudiskan defendan.

In brief, the striking out order was made as the plaintiff had failed to take out a summons for directions in accordance with the foregoing provisions of the Rules of the High Court 1980; and in the alternative, the plaintiff had committed inordinate and inexcusable delay. That delay and act had prejudiced the interest of the defendant.

Without much delay, on 24 February 1998 the plaintiff filed a second writ of summons registered as GS 22–15–1998, ie the current action before this court. On 3 April 1998, the defendant filed an application to strike out GS 22–15–1998 before the senior assistant registrar but failed. The defendant subsequently filed an appeal and I thereafter heard it. I dismissed that appeal with costs and I now give my reasons for that decision.

The main point of contention submitted and strenuously argued by the defendant was that even though the second writ was filed within the limitation period, because of the nature of the order pronounced on 7 January 1998, the plaintiff should not be allowed to refile a similar action. According to the defendant, the first summons was dismissed on the ground that the plaintiff's delay in prosecuting the action which was intentional, contumelious/contemptuous, inordinate and unforgiveable had prejudiced the defendant. The refiling was an abuse of the process of the court. The basis of the defendant's objection has statutory backing as O 18 r 19 permits a court to strike out such action if the plaintiff had committed an abuse of the process of the court. The *Supreme Court Practice* (1995) Vol 1 p 475 had even this to say:

> If the limitation period has not expired, the need to issue a second writ would only arise if the action had been dismissed for contumelious conduct or as an abuse of the process of the court. If the plaintiff then issues a second writ for the same cause, the question arises whether the second action can be stopped as an abuse of the process of the court. There has been some difference of opinion on the point; the best view is that the second action can be stopped unless the plaintiff gives a satisfactory explanation for his contumely (*Janov v Morris* [1981] 1 WLR 1389; [1981] 3 All ER 780 (CA), approved in *Palmer v Birks* (1986) 83 LS Gaz 125 (CA)).

During the hearing, both parties agreed that the contents of the second writ were similar to that of the first; and the filing of the second writ was done within the limitation period. It was also accepted that in the normal course of events, if time had not lapsed, there would be no legal impediment or barrier to prevent the filing of the second writ. Unfortunately in this case, it was alleged that there were certain factors that would deny the right of the plaintiff to file the second writ even though still within time. These factors, as submitted by the defendant, portrayed contumelious conduct on the part of the plaintiff. In support of his submission, learned counsel for the defendant referred to the very order of 7 January 1998 as proof of that conduct. He canvassed that that order was pursuant to a peremptory order, the non-compliance of which was construable as disobedience and insubordination. If that assertion were to be legally and factually correct, then the inaction of the plaintiff could certainly fall within the perimeters of the view of the abovementioned *Supreme Court Practice* (1995). Apart from the enlightening paragraph in the *Supreme Court Practice*, precedents are abound establishing the principle that no writ may be permitted to be filed a second time if the previous conduct of the plaintiff was contumelious. To understand this principle better, I shall attempt to clarify it by straying into the historical aspect of it, with particular reference to an 'unless' order, beginning with the case of *Whistler v Hancock* (1878) 3 QBD 83. In that case, the defendant obtained an order that unless the statement of claim was delivered within a week, that action would be at an end. As it were, the plaintiff failed to comply with that 'unless' order and the action accordingly lapsed. In *King v Davenport* (1879) 4 QBD 402, the time given was only 14 days. Those two early day

cases exemplified and enunciated that courts had no jurisdiction to entertain an application to extend time once an 'unless' order was issued. Come *Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803 at p 812, Roskill LJ said:

> In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily, it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not.

The change in attitude was similarly seen in *Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd & Ors* [1980] 2 All ER 655 at p 662, when the court held that in spite of the order given, the action was still sufficiently alive. It thenceforth permitted a party called Tesco to join the other defendants.

'Unless' orders are no strangers to the Malaysian judiciary (*Mallal's Supreme Court Practice* (2nd Ed) p 15; *Malaysian High Court Practice* (1998 Desk Edition 1) p 33). The principles that exist for such orders similarly apply to other forms of peremptory orders which are commonly issued by courts. The effect too is quite similar (The *Supreme Court Practice* (1997) Vol 1 p 19; Practice Direction [1986] 2 All ER 576). To summarize, a peremptory order or 'unless' order, without attempting too specific a definition, is an order that must invariably befall, without the necessity of any cause required to be shown, in the event there was non-compliance by the party ordered against, of some specific court order. A simple example of an 'unless' order, suitable only where the affected party is present or represented, may be in this form:

> Unless by 4pm on Friday, 27 November 1998 the defendant serves his list of documents on the plaintiff, the defence shall be struck out and judgment entered for the plaintiff with costs.

An example of a peremptory order may be in this form (similar suitable only where the affected party is present or represented):

> It is ordered that the defendant by 4pm on Friday, 27 November 1998 do serve his list of documents on the plaintiff.

It will be of immense assistance to all parties concerned, if a mention date is fixed a few days after 27 November 1998 (in relation to this hypothetical case) to ascertain that the above peremptory or 'unless' order had been complied with. In the event there was non-fulfilment, and unless the judge invokes his discretionary power to add some other additional requirements, or further time is given, that order may be enforced.

In *Janov v Morris* [1981] 3 All ER 780, Watkins LJ at p 785 had occasion to say with regard to the non-compliance of a peremptory order:

> In the event of his action being ordered to be struck out for failure to obey a peremptory order, he may appeal .... If a litigant neglects to avail himself of that procedure and brings a fresh but precisely similar action to that ordered to be struck out, without any explanation then or at any later time

A for a failure to obey the peremptory order, he should not be surprised that the commencement of the second action is found to be an abuse of the process of the court and for that reason it, too, is struck out.

In *Bailey v Bailey & Anor* [1983] 3 All ER 495, the Court of Appeal distinguished the situation where a plaintiff disobeyed a peremptory order B of the court regarding the prosecution of an action, and subsequently commencing fresh proceedings within the limitation period, and raising the same course of action, in contrast to another situation where a new suit was filed after the earlier one had been struck out for want of prosecution. In the latter case, it was held that the mere failure of the plaintiff to comply with the procedural rules, did not prevent him from initiating the second C though similar action. Dunn LJ at p 497 distinguished the two fundamental differences in approach when he said:

> *Janov v Morris* was a case in which, in the first action, there had been a peremptory order of the court against the plaintiff which the plaintiff had failed to comply with, and accordingly had been guilty of what has been D described in the authorities as contumelious conduct. It was on that ground that the first action in *Janov v Morris* was struck out. That has always hitherto been regarded as a different situation from the situation here, where the first action was dismissed for want of prosecution on the ground that there had been inexcusable delay in circumstances in which the conduct of the plaintiff could not be described as contumelious.

E Adverting to the High Court order dated 7 January 1998, and applying the above principles of *Bailey v Bailey & Anor*, clearly the first part of the order permitted the plaintiff to refile his case, if still within time. To reiterate, that part merely asserts that the action was struck out for want of compliance of O 25 r 1(4) of the Rules of the High Court 1980, indisputably conduct F which could not be described as contumelious. The defendant submitted that the second part of the order, which was in the alternative, was a different kettle of fish in that it was wide enough to cover the situation where the conduct of the plaintiff could be construed as contumelious.

I was unable to accede to this argument as:

G (1) there was no certainty that the case was struck out due to the contumelious behaviour of the plaintiff as the order was in the alternative. It could have been struck out due to non-compliance of one of the rules of the Rules of the High Court 1980. I therefore gave the benefit of the doubt to the plaintiff; and

H (2) scrutinizing the second part of the order, which was in the alternative, the translated version will read that the inordinate and inexcusable delay was the cause of the striking out. In other words, the pretext was the delay. There was absolutely nothing contained within this part to indicate that disobedience of a peremptory order or an 'unless' order was the basis. As disobedience towards either of these orders I had not been established, the defendant therefore had failed to prove the existence of that contumelious conduct. That being so, the defendant had miserably failed to prove that the plaintiff had abused the process of the court.

For the defendant to successfully assert that there was contumelious conduct, pursuant to disobedience of either a peremptory order or 'unless' order, the above Practice Direction ([1986] 2 All ER 576) clearly indicated that such orders must leave no room for flaws. They should, inter alia, include the date, time, place, party and the act supposed to be complied with. It must be stressed that to deny a plaintiff his rights to a cause of action, especially when time has not run out, will require a very serious 'offence' to have been committed by him. Courts therefore should ensure that the rights of every party are protected, before resorting to or enforcing those unique orders.

To conclude, perusing the court's order, I could not but conclude — after comprehending the order of 7 January 1998 — that the case was struck out for the non-compliance of O 25 r 1(4) of the Rules of the High Court 1980 or in the alternative for want of prosecution. I found no evidence to persuade me that the basis was founded on a peremptory order or an 'unless' order. That being so, there was thus no legal requirement or sanction imposed on the plaintiff to supply any explanation. I viewed the plaintiff's course of action as analogous to a party who withdrew an action, with liberty to file afresh, and thereafter refiling but doing so within the limitation period. Based on the above grounds, I dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Lew Chee Seong